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Supreme Court of the United States

No. [illegible]
1962

LOCAL No. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,
Petitioner,

versus

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN, DOING BUSINESS AS S. J. CURRY & COMPANY, A PARTNERSHIP,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF ON BEHALF OF S. J. CURRY, ET AL., RESPONDENT.

H. H. PERRY, JR.,
and
ROBERT B. LANGSTAFF,
Attorneys for Respondent.

P. O. Address:
P. O. Box 747,
Albany, Georgia.

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SUPREME COURT OF THE UNITED STATES.

No. 839.

LOCAL No. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,

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S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN, DOING BUSINESS AS S. J. CURRY & COMPANY, A PARTNERSHIP,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF ON BEHALF OF S. J. CURRY, ET AL., RESPONDENT.

I.

THE PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED.

The petition for certiorari seeks to have this Court review a judgment of the Supreme Court of Georgia which reversed an interlocutory judgment or order of Fulton County Superior Court. The judgment of the Supreme Court of Georgia in reversing the trial court

has in effect returned the case to the lower court for such further disposition as may be proper under the pleadings. The case now stands on the trial docket of Fulton Superior Court for final trial. There is, therefore, no final judgment in the case such as would give this Court jurisdiction to entertain a petition for writ of certiorari.

This Court has previously ruled clearly and concisely that a case such as the instant case is not ripe for review by virtue of a writ of certiorari and has stedfastly denied such writ except in some few cases where certiorari has inadvertently been granted. There is perhaps no clearer expression of the position of this Court to be found on the subject, than in the case of *Montgomery Building & Construction Trade Council, et al., petitioners vs. Ledbetter Erection Company, Inc.* reported in 344 U. S. 178, 97 L. Ed. 204 and 73 S. Ct. 196. Judge Minton, in speaking for a seven member majority and in determining whether a judgment on an interlocutory order from the Supreme Court of Alabama was a final decree subject to review, pointed out on page 180 of that decision:

> "From the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees, such as is involved in this case. In Gibbons v. Ogden (US) 6 Wheat 448, 5 L ed 302, the first case presenting this issue to this Court, an injunction had been granted by a Chancery Court of the State of New York. The defendant answered and moved to dissolve the injunction. The court denied the motion to dissolve and the defendant appealed to

the Court for the Trial of Impeachments and Correction of Errors which affirmed.

The appeal to this Court was dismissed because there was no final decree in the court of last resort for this Court to review.

The provision of §1257 that only 'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .' has been carried in almost identical language since the Judiciary Act of 1789, 1 Stat 85, §25.

'This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.' Radio Station WOW v. Johnson, 326 US 120, 124, 89 L ed 2092, 2097, 65 S Ct 1475.

The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in Gibbons v. Ogden (US) supra. There is no room here for interpretation. The rule remains unchanged."

In response to the argument of petitioner that to wait the outcome of the final hearing would be but to moot the question and to frustrate the picketing, Judge Minton further said on page 181 of that decision:

"It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such argu-

ment may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that. Furthermore, the interlocutory decree could have been readily converted into a final decree, and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case.

Since there was no final judgment of the Supreme Court of Alabama for review, the writ of certiorari must be dismissed as improvidently granted."

The reasoning of Justice Minton in the *Montgomery* case, *supra*, remains sound and is certainly applicable to the facts presently before the Court under petitioner's writ. Notwithstanding any contentions by the petitioner that the interlocutory order in the instant case is a final order for all purposes and intentions, the fact remains that this Court is being asked to review nothing more than an interlocutory order or judgment and that the case has not been finally disposed of within the meaning of 28 U. S. C. §1257. See also *American Federation of Labor vs. Swain*, 312 U. S. 321, 85 L. Ed. 855, 61 S. Ct. 568; *Gibbons vs. Ogden*, (US) 6 Wheat 448, 5 L. Ed. 302; and *Moses vs. Mobile*, (US) 15 Wall 387, 21 L. Ed. 176.

In recognition of the prior rulings of this Court and in an attempt to evade such decisions, the petitioner has incorporated into its brief an affidavit which purports to demonstrate that over the past ten years not a single application for an interlocutory injunction was ever processed to a final hearing in Fulton Superior

Court. However, even assuming that this Court could properly consider such *aliunde* evidence, the fact remains that the present case remains undisposed of in the trial court and stands ready for trial when called for final hearing. It might also be pointed out in passing that the petitioner itself has a plea in abatement pending in the trial court which has not been disposed of and, further, that although the judgment of the Supreme Court of Georgia has been made the judgment of the lower court, no order has ever been entered restraining the conduct of petitioner. Thus, the instant case has not reached that degree of finality that would make it subject to review by this Court under the writ of certiorari.

II.

THE SUPREME COURT OF GEORGIA DID NOT ERR IN FINDING THAT THE CONDUCT OF PETITIONER HAD VIOLATED THE RIGHT TO WORK STATUTES OF THAT STATE.

The Supreme Court of Georgia in the decision below, which is reported in 217 Ga. 512, and also in 123 S. E. 2d 653, found by the undisputed evidence of the record that at the time of the placing of the picket in question the respondent had no labor dispute with its employees and further that the petitioner was not representing any employee of the respondent. The Court further found that the petitioner had chosen to use a method of imparting information to the public which it knew would have the effect of paralyzing the respondent's operation and thus preventing them from completing

their contract within the time limit provided by its terms and also forcing the respondent to discharge a number of their employees. The Supreme Court of Georgia found that the facts of this case were similar to the case of *Powers vs. Courson*, 213 Ga. 20 (96 S. E. 2d 577) and demanded a finding that the picket was placed on the job by the petitioner for the purpose of forcing the respondent to employ only union labor or to be unable to comply with the terms of their contract because of the refusal of members of other unions employed on the same construction site to cross the picket line and thereby bringing the project to a virtual standstill. Having found these facts from the record, the Supreme Court of Georgia then concluded that the picketing was for unlawful purposes and clearly a violation of the provisions of the Annotated Code of Georgia, 1933, §54-804 and §66-9906.

The Court's attention is invited to that portion of the record which reflects the affidavits of S. J. Curry and B. L. Humphreys, Jr. (transcript Exhibits A and B), which affidavits unequivocally state that a demand was made to hire union workers on this particular job and after a refusal to do so, the union stated that they would use every means at their disposal to see that union workmen were used on this job. There was no evidence introduced by the petitioner at the interlocutory hearing in Fulton Superior Court to contradict the statements of Curry and Humphreys, except some general statement that the right to work statutes of the State of Georgia had not been violated, which of course was a mere conclusion on the part of the affiant. It is

respectfully submitted that the Supreme Court of Georgia's judgment was well supported by the evidence in the record; and the circumstances set forth in the opinion of that Court afford a rational basis for the inference it drew concerning the purpose of the picketing. In this connection see *Ellis, et al. vs. Parks*, 212 Ga. 540, 93 S. E. 2d 708; *Woodward, et al. vs. Collier, et al.*, 212 Ga. 239 (78 S. E. 2d 526) and *Powers vs. Courson, et al.*, 213 Ga. 20 (96 S. E. 2d 577); also *Local Union No. 10, United Association of Journeymen, Plumbers and Steamfitters of the United States and Canada of the AFL, et al. vs. O. J. Graham*, 345 U. S. 192, 97 L. Ed. 946, 73 S. Ct. 585.

III.

THE JUDGMENT OF THE SUPREME COURT OF GEORGIA WAS NOT AN INFRINGEMENT UPON ANY RIGHT GUARANTEED TO THE PETITIONER BY VIRTUE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

That the State of Georgia may enjoin peaceful picketing, consistent with the constitutional guarantees of the Constitution of the United States, when such picketing is carried on for purposes which conflicts with the right to work statutes of the State of Georgia is a proposition which has been well settled by this Court. In this connection see *Local Union No. 10, United Association of Journeymen, Plumbers and Steamfitters of the United States and Canada of the AFL, supra; Building Service Employees International Union vs. Gazzam*, 339 U. S. 532, 94 L. Ed. 1045, 70 S. Ct. 784; *International Brother-*

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IV.

CONCLUSION.

It is, therefore, respectfully submitted that the writ of certiorari should be denied for the reason that there is no final order or judgment ripe for review by this Court and for the further reason that the Supreme Court of Georgia has committed no error in the application of the right to work statutes of that state to the facts in the instant case nor has the Supreme Court of Georgia, by virtue of its decision, abridged any rights guaranteed to the petitioner under the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

By .....
H. H. PERRY, JR.,

and

By .....
ROBERT B. LANGSTAFF,
Attorneys for Respondent in Certiorari.

PERRY, WALTERS & LANGSTAFF,
P. O. Box 747,
Albany, Georgia.

I do hereby certify that I have this day served the petitioners in the within case with copies of the foregoing brief of respondent, by mailing a copy of the same to Mr. Edwin Pearce and Mr. John Patton, 1642 Bank of Georgia Building, Atlanta 3, Georgia, they being attorneys of record for petitioners.

All of this on the ..... day of April, 1962.

ROBERT B. LANGSTAFF.